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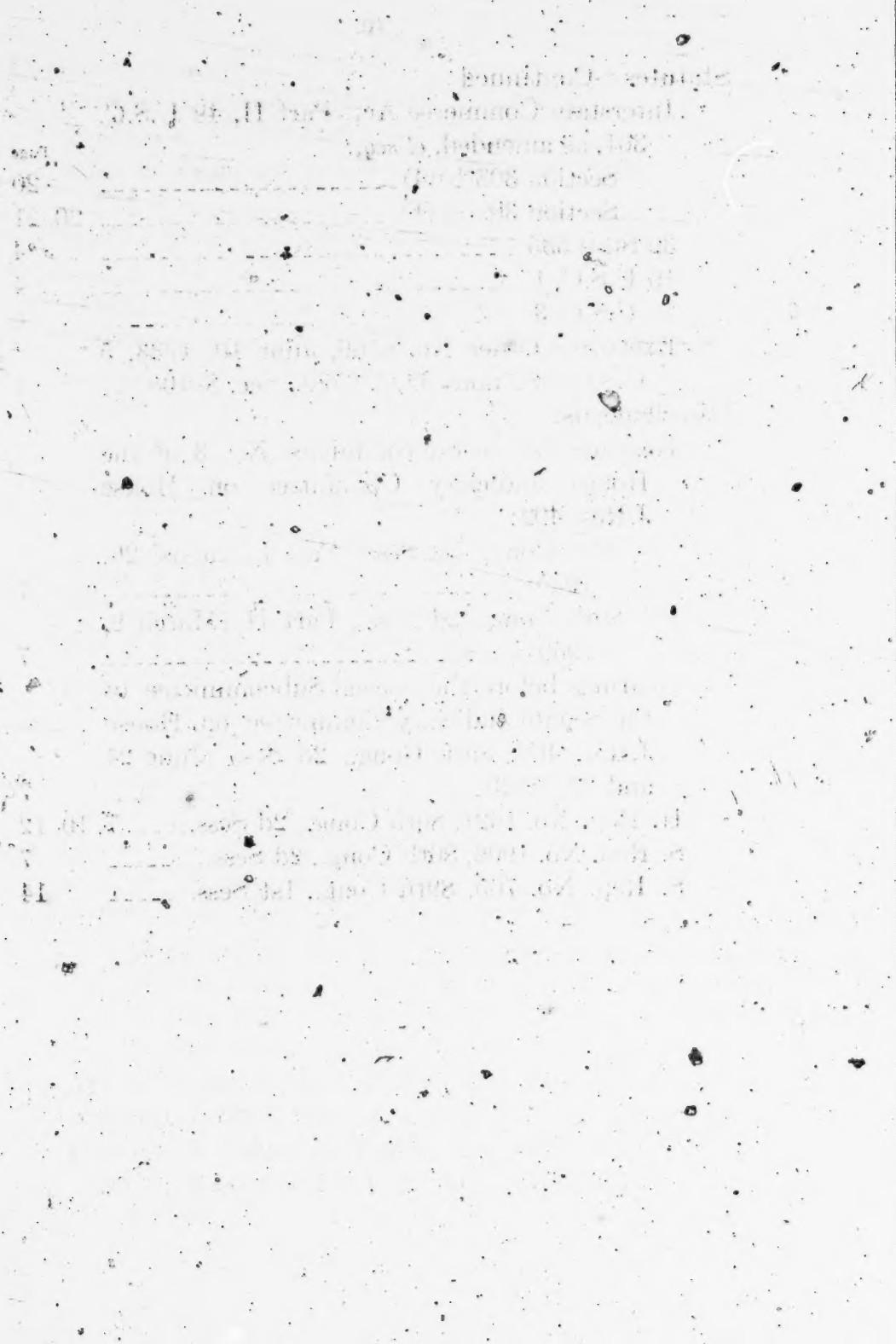


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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 978

UNIVERSAL INTERPRETIVE SHUTTLE CORPORATION,
PETITIONER

WASHINGTON METROPOLITAN AREA TRANSIT
COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

Combining natural beauty with the presence of national monuments and museums, the great Mall in the Nation's capital each year attracts a growing number of visitors from every State in the Union and from foreign nations as well. To provide for these visitors is the responsibility of the National Park Service. The issue in this case is whether the Congress, in 1960, in approving the creation of the Washington Metropolitan Area Transit Commission to end "divided regulatory responsibility" over "mass transit

service" in the Washington metropolitan area, intended that the newly created Commission should also exercise jurisdiction over a "minibus" service to be provided by a Department of the Interior contract concessionaire in a compact park area subject to the exclusive authority of the National Park Service.

The factual situation which led to the institution of this litigation is a simple one. By 1965 the increasing number of visitors to the Mall led the Secretary of the Interior to conclude that some effective means of transportation within the park area was required which would, at the same time, permit a more meaningful interpretation of the points of interest visited. Because the National Park Service normally provides transportation and sightseeing services in the national parks through concessionaires, bids were sought for the operation of a closely supervised-interpretive tour of the Mall area. The successful bidder was petitioner Universal Interpretive Shuttle Corporation.

After a temporary contract had been entered into and while a permanent contract was awaiting the negative approval of Congress as required by 16 U.S.C. 17b-1, the Transit Commission instituted this action to enjoin Universal from furnishing the service without first having obtained a certificate of public convenience and necessity from the Commission. The United States was permitted to file a representation of interest and to present evidence in support of Universal.

After a trial, the district court dismissed the suit, writing a detailed opinion which thoroughly discussed the various contentions made (App. 97-112). The

court of appeals, with one judge dissenting, reversed, writing no opinion but merely entering an order stating that "the various relevant statutory provisions, construed in relation one to the other," do not afford authority for the concessionaire to provide the contemplated service without a transit commission certificate (App. 113-114). A petition for rehearing *en banc* was denied, with two judges dissenting (App. 115). Certiorari was granted, upon the application of petitioner, supported by the United States, on March 4, 1968 (App. 116).

ARGUMENT

I. CONGRESS DID NOT INTEND TO IMPAIR THE NATIONAL PARK SERVICE'S EXCLUSIVE AUTHORITY OVER NATIONAL PARK AREAS IN THE DISTRICT OF COLUMBIA IN APPROVING THE COMPACT CREATING THE WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

1. Reduced to its essentials, the issue involved in the instant case is simply one of statutory construction. There can be no dispute that the policy of Congress in legislating for the District of Columbia has consistently contemplated that matters of national concern, such as government buildings and national monuments and parks, should be administered by federal agencies. At the same time, the administration of municipal affairs, i.e., those matters commonly handled at the local level, has been, with some reservations, assigned to agencies of the District of Columbia government.

Thus, in the Act of July 1, 1898 (30 Stat. 570), Congress placed the park system of the District of Columbia under the "exclusive charge and control" of

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the Chief of Engineers. This authority devolved to the Director of Public Buildings and Public Parks in the Act of February 26, 1925 (43 Stat. 983), and to the National Park Service by virtue of Executive Order No. 6166, dated June 10, 1933, 5 U.S.C. 132 (note) (D.C. Code, Sec. 8-108). Lands required for additional parks in the District of Columbia, acquired by the National Capital Planning Commission pursuant to the Act of June 6, 1924 (43 Stat. 463), are also administered exclusively by the National Park Service, except such areas as may be assigned to the District of Columbia for playground purposes.

This "exclusive charge and control" has always meant not only responsibility for the physical upkeep of the parks, the planting of trees, the construction of roads and walkways and the repair of monuments, but has included throughout authority to regulate all aspects of park use, to provide police protection and control and to devise means for increasing the attraction and utility of the national park areas (see 16 U.S.C. 3).

2. The District of Columbia Public Utilities Commission was established by the Act of March 4, 1913 (37 Stat. 974, 977), for the regulation of gas and electric companies, street railroad corporations and common carriers engaged in the transportation of passengers "from one point to another within the Dis-

* The National Park Service was created in 1916 (39 Stat. 535) as an agency of the Department of the Interior to "promote and regulate the use of the Federal areas known as national parks, monuments, and reservations * * * by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations * * *" (16 U.S.C. 1).

trict of Columbia." When the bus began to compete with the streetcar as a means of transportation for hire, specific authority to regulate the routing and scheduling of all common carriers "within the District of Columbia" was granted to the Public Utilities Commission.² Significantly, however, this was accomplished by an amendment to the District of Columbia Traffic Act of March 25, 1925 (43 Stat. 1119), which, in Section 16(b), contained the following express provision:

Nothing contained in this Act shall be construed to interfere with the exclusive charge and control heretofore committed to the Chief of Engineers over the park system of the District, and he is hereby authorized and empowered to make and enforce all regulations for the control of vehicles and traffic, and limiting the speed thereof on roads, highways, and bridges within the public grounds in the District, under his control * * *. [43 Stat. 1126 (D.C. Code, Sec. 40-613).]

Thus, at the time the compact creating the Transit Commission was approved by Congress in 1960, the Public Utilities Commission of the District of Columbia (now the Public Service Commission) concerned itself with normal regulation of common carrier bus operations, routes, fares, etc., in the non-park areas of the District. Neither the Public Utilities Commission nor any other agency of the District government had any substantial authority regarding traffic or the regulation of public transportation in the Capital's

² Act of February 27, 1931 (46 Stat. 1424, 1426).

park areas. If an occasional bus line in its routing used a street in the park areas, this was done because the National Park Service did not object—not because authority to route a bus line through those areas was vested in a local agency. And if certificated sightseeing buses brought visitors into the park areas, they did so because such action was approved or tolerated by the National Park Service—not because of any authority predicated on their licenses.

As a practical matter, until the number of visitors to the national park areas in the District of Columbia reached problem proportions, the National Park Service did not concern itself with means of transportation within the park enclaves. The public has traditionally reached these areas by foot, by private automobiles or by sightseeing buses. Parking and use of park roads have been permitted either by sufferance or by special permit issued by the National Park Service. Because sightseeing bus companies operated throughout the city and only incidentally in national park areas, they were licensed by the District of Columbia Public Utilities Commission or by its successor, the Transit Commission.

3. With the rapid growth of the Virginia and Maryland suburbs after World War II, the initially intrastate nature of the functions assigned to the three separate public utilities commissions concerned with the regulation of common carriers in the Washington metropolitan area took on increasing complexities of an interstate nature. Following a study by the National Regional Planning Council and after successful negotiations between representatives of Virginia,

Maryland and the District of Columbia; Congress, by a joint resolution approved September 15, 1960, (74 Stat. 1031, now D.C. Code, Sec. 1-1410 *et seq.*), gave its consent to a compact which, in substance, provided for the creation of a new commission. That body was to exercise the mass transit regulatory functions previously exercised, in the Washington metropolitan area, by four separate agencies—the Interstate Commerce Commission and the pertinent commissions of Virginia, Maryland and the District of Columbia.¹

Nowhere in this legislation or in its legislative history,² is there any indication of congressional intent to diminish or impair the exclusive jurisdiction of the National Park Service over the administration of national park areas. That exclusive jurisdiction, moreover, plainly includes the authority of that governmental agency to determine the need for a service to facilitate the enjoyment of visitors to the park areas and to determine the details of how that service

¹ As succinctly expressed in H. Rep. No. 1621, 86th Cong., 2d Sess., p. 26, "The powers to be exercised by the * * * Commission under the compact are comparable to those presently exercised by the Public Utilities Commission of the District of Columbia, and, similarly, would not unlawfully impinge upon the legislative power of the Congress over the District of Columbia." Similarly, in S. Rep. No. 1906, 86th Cong., 2d Sess., p. 2, it was pointed out that "the compact centralizes to a great degree in a single agency * * * the regulatory powers of private transit now shared by four regulatory agencies."

² See H. Rep. No. 1621, 86th Cong., 2d Sess.; S. Rep. No. 1906, 86th Cong., 2d Sess.; Hearings before Subcommittee No. 3 of the House Judiciary Committee on House J. Res. 402, 86th Cong., 1st Sess., Part I (August 26, 1959); *id.*, 86th Cong., 2d Sess., Part II (March 9, 1960); Hearings before the Special Subcommittee of the Senate Judiciary Committee on House J. Res. 402, 86th Cong., 2d Sess. (June 24 and 25, 1960).

will be provided. All that the Secretary of the Interior has done here is to attempt to arrange an interpretive shuttle service which will give visitors a meaningful tour of park areas committed to his exclusive control. That Congress did nothing in 1960 to affect his authority to do so seems clear; once the nature of the service proposed and the purpose underlying the creation of the Transit Commission are understood.

Respondents purport to find a contrary congressional intent in a provision of Title II, Art. XII, Section 1(a), of the compact (74 Stat. 1035), which states that the agreement shall apply "to the transportation for hire by any carrier of persons between any points in the Metropolitan District."⁵ Given the background of this legislation, however, it is clear that the phrase "transportation for hire," as used in this section, pertains to the mass transit activities previously regulated by the separate commissions, and the phrase "any points in the Metropolitan District" emphasizes the interstate locale of the new commission's jurisdiction.⁶

⁵ Respondents' reliance on the decision and opinion of the court of appeals in *D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Comm'n*, 376 F. 2d 765 (C.A.D.C.), certiorari denied, 389 U.S. 847, seems misplaced. In the very passage from the court's opinion quoted by respondents, it was pointed out that "[n]o one could engage in the transportation covered by the Compact except upon its terms * * *" (*id.* at 767 [emphasis added]). Of course, the question involved here is whether the contemplated service constitutes "transportation covered by the Compact."

⁶ Respondents' reference to the fact that certain non-commuter service of a sightseeing nature has been held to be within Transit Commission jurisdiction is not pertinent. Authority

Literally speaking, of course, the service to be furnished by Universal will be "transportation for hire" and, literally speaking, the Mall area is located within the metropolitan district. A merely literal interpretation, however, would not be in keeping with the obvious intention of the lawmaker. E.g., *Lynch v. Overholser*, 369 U.S. 705, 710; *United States v. Witkovich*, 353 U.S. 194, 199; *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479. And this Court has never been reluctant to give a narrow construction to broad language used by Congress when it is evident, from the circumstances surrounding the enactment of the legislation, that the congressional purpose was a more limited one. E.g., *Rathbun v. United States*, 355 U.S. 107, 109; *Markham v. Cabell*, 326 U.S. 404, 409; *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-544. That approach toward statutory construction was followed here by the district court. In rejecting the Transit Commission's reliance on the literal language of one provision in the compact approved by Congress, the court stated that "[t]here is nothing in the Compact or the history of the Compact which would hint that it was intended to limit the exclusive jurisdiction of the Secretary of the Interior to

over such service is predicated essentially on the fact that such control was previously exercised by the various regulatory agencies whose jurisdiction was superseded by the new commission. Moreover, such sightseeing and charter service is distinguishable from the service here proposed in that those carriers operate not only within the confines of national park areas but pick up and deposit persons outside those areas and, as a general matter, traverse the public streets and highways for considerable distances.

maintain and operate the Park enclave, and, if he so desired, to run a tram within the Park enclave for the edification of visitors" (App. 108).¹ In short, Congress did not purport, in approving the compact, to repeal existing legislation giving the National Park Service "exclusive charge and control" over national park areas in the District. Repeals by implication are of course not favored, and acts of Congress which are assertedly in conflict should be interpreted, if possible, to produce a harmonious result. *E.g., Posadas v. National City Bank*, 296 U.S. 497, 503; *United States v. Wittek*, 337 U.S. 346, 358-360. Accordingly, the language of the compact should be read against the background of the plain and overriding intention of the lawmaker—to provide a solution for pressing interstate mass transit problems in the Washington area by assenting to the creation of the Transit Commission. So read, it is clear that the contemplated service is outside the scope of that body's jurisdiction. Indeed, the purpose for which the new commission was created is wholly extraneous to the incidental movement of visitors ~~in~~ national park areas by a government concessionaire.

¹ Additional support for its conclusion was found by the district court in the fact that the "specific list of the laws which the Congress thought would be suspended during the operation of the Compact *** does not contain any law or regulation under which the Secretary has exercised his jurisdiction over the D.C. Park System" (App. 108-109; see H. Rep. No. 1621, 86th Cong., 2d Sess., pp. 29-30).

II. EXPRESS PROVISIONS OF THE APPROVING LEGISLATION AND THE COMPACT EXCLUDE THE PROPOSED SERVICE FROM THE TRANSIT COMMISSION'S JURISDICTION

Apart from the fact that the background and context of the approving legislation confirm that Congress did not intend to interfere with the National Park Service's exclusive jurisdiction over the Mall area, specific provisions of that legislation and the compact itself exclude the contemplated service from Transit Commission control.

1. In the legislation approving the compact (74 Stat. 1051), Congress specifically provided that nothing in that statute or in the compact "shall affect the normal and ordinary police powers of the signatories and of the political subdivisions thereof and of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities." Given the purpose of this legislation and the absence of any reference in the legislative history to any proposed transfer of control over activities in national park areas (see note 4, *supra*), the quoted language alone is sufficient to indicate that a grant of authority over "transportation for hire * * * in the Metropolitan District" did not vest in the newly created commission jurisdiction over the proposed service.

Respondents seek to minimize the significance of this provision by noting that when the approving legislation was considered the Assistant Secretary of the Interior suggested that the language "police powers * * * of the Director of the National Park Service" b

changed to "authority and responsibility of the Secretary of the Interior" derived from acts of Congress pertaining to the National Park System (H. Rep. No. 1621, 86th Cong., 2d Sess., pp. 48-49). No action was taken on this suggestion. In the absence of any expression of reasons why the suggestion was not adopted, congressional inaction in this regard cannot properly be viewed as undermining any reliance by the Secretary on the "police powers" exclusion or as providing any affirmative support for respondents' position. Indeed, it is not unlikely that Congress simply believed that the exception of "police powers * * * of the Director of the National Park Service" was as effective to maintain the status quo as was the use of the term "authority and responsibility of the Secretary of the Interior." Without conjecturing about the committee members' subjective reaction to the Secretary's suggestion,⁸ it is enough to say that the authority a governmental agency exercises in the administration of property owned by the United States has often been referred to by the courts as a "police power." In particular, the term "police power" neces-

⁸ It should be noted that the Secretary referred to the changes suggested as "clarifying amendments" in view of his concern that the term "police powers" was not sufficiently "descriptive of the authority and responsibilities of the Director of the National Park Service * * *" (H. Rep. No. 1621, 86th Cong., 2d Sess., p. 49). It is quite possible that the Secretary's suggestion was dismissed as an unnecessary refinement. The legislation was not conceived or drafted with any intent to affect the operation of national park areas, and a request that the language be redrafted in its final stages merely to make more certain what was already clear might well be expected not to fall upon hospitable ground.

sarily includes the full scope of existing authority delegated by the Congress to an executive agency to make rules and regulations relating to property of the United States. *Berman v. Parker*, 348 U.S. 26, 32; *Camfield v. United States*, 167 U.S. 518, 525; *State of Tennessee v. United States*, 256 F. 2d 244, 258 (C.A. 6); *Robbins v. United States*, 284 Fed. 39, 45 (C.A. 8).

2. Language in the compact itself similarly provides for exclusion of the proposed service from Transit Commission regulation. In Title II, Art. XII, Section 1(a) (74 Stat. 1035, 1036), the compact specifically states that the jurisdiction of the new commission over "transportation for hire" would not include "transportation by the Federal Government, the signatories hereto, or any political subdivision thereof."* Even aside from the considerations already advanced, the foregoing exception leaves no doubt that a minibus service on the Mall, if operated directly by employees of the National Park Service, would not require a certificate of public convenience and necessity from the Commission. Respondents have consistently conceded this. But they refuse to accept the proposition that the identical service, if provided by a closely controlled government concessionaire, is equally "transportation by the Federal Government" and is similarly excepted under this specific provision. This line of reasoning, however, was the alternative basis of the district court's decision. Noting "the high degree of control

* Among other exemptions provided for in the same section are school buses, transportation by water and transportation for hire solely within the Commonwealth of Virginia.

which the Secretary exercises over this concessionaire," that court rejected the Commission's argument that the service must be provided by the government directly, and not through an agent, to come within the compact's excepting language (App. 109-110). That conclusion, we submit, properly reflects the purpose of the exemption for governmental transportation.

The National Park Service has traditionally offered services to the public through agencies of private enterprise. In the Act of May 26, 1930 (46 Stat. 382), now 16 U.S.C. 17b, Congress specifically authorized "the Secretary of the Interior * * * to contract for services or other accommodations provided in the national parks." More recently, in the Act of October 9, 1965 (79 Stat. 969), 16 U.S.C. (Supp. I, 1965) 20a, the Secretary of the Interior was directed to "take such action as may be appropriate to encourage and enable private persons and corporations * * * to provide and operate facilities and services which he deems desirable for the accommodation of visitors in areas administered by the National Park Service."¹⁰ The view that services in national parks, including those relating to transportation, may be furnished by the United States either directly or through a contract arrangement with a private concessionaire was specifically commented upon in *United States v. Gray Line Water Tours of*

¹⁰ See S. Rep. No. 765, 89th Cong., 1st Sess., p. 2, which is part of the legislative history of this enactment and which points out that "[t]he Government now depends heavily, and must continue to depend heavily, on private entrepreneurs to provide visitors to the national park system with necessary facilities and services."

Charleston, 311 F. 2d 779, 781 (C.A. 4). There the court upheld the authority of the National Park Service to grant a preferential concession to a private company for the transfer of visitors by small boat to Fort Sumter, and stated (*ibid.*):

The concession, we hold, was quite within the purpose and intentment of the Act setting Fort Sumter apart as a national monument. The Congress declared it should be "for the benefit and enjoyment of the people of the United States" but, obviously, to be made available to the public, water craft of some kind had to be provided. *It, of course, could be undertaken either by the United States directly or through a private waterman.* [Emphasis added.]

We recognize, of course, that government contractors are not always to be equated with the government itself, such as for purposes of claiming tax immunity. But in other contexts such contractors have been held immune from State regulation where application of such authority "would give the State's licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy." *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 190; cf. *Yearsley v. Ross Construction Co.*, 309 U.S. 18. In the present case, for the purpose of interpreting this section of the compact, it would seem controlling that to administer the park areas the Secretary of the Interior must be able to determine such basic questions as the need for a mini-bus service in the park, the type of equipment, the scheduling, the fees to be charged and the type of in-

terpretive service to be furnished. All of these matters, and numerous other details, are inherent in and would necessarily be considered by a regulatory body in determining whether to grant an applicant a certificate of public convenience and necessity. Not only would the tripartite Transit Commission, under respondents' view, have the sole authority to make such determinations as an initial matter; that body's jurisdiction would need to be invoked each time the Secretary determined that a change in the manner of service was required.

It is not difficult to conceive of the confusion and conflict which would predictably result from such a bifurcation of authority over non-commuter transportation in national park areas. In addition, one who applies for a certificate from the Commission, or an amendment to an existing certificate, might well become involved in extensive proceedings entailing delay and the introduction of issues wholly extraneous to the concerns of the Secretary. Indeed, one spring and summer has passed and another will be gone without the contemplated service being available. If like difficulties are encountered by prospective contract concessionaires, it might be expected that the Secretary will be unable to interest companies in seeking to provide such a service. Should that eventuate, not only will the Secretary's control over the utilization and development of national park areas like the Mall be effectively thwarted, but the significant public interest in such service will not be effectuated. That is hardly a result which Congress, which specifically directed the Secretary to provide services in national

park areas through private concessionaries (16 U.S.C. (Supp. I, 1965) 20a), should be viewed as having intended in approving the compact creating the Washington Metropolitan Area Transit Commission.

Respondents maintain, however, that no substantial problems will result if the Commission is found to have jurisdiction over the contemplated service. Any difficulties which might develop can be resolved, they say, in a spirit of cooperation. Perhaps that is so, but it seems obvious that if the Transit Commission has regulatory authority over the proposed service, it will have the ~~final~~ say on all important matters relating to the concessionaire's obligation and performance, the Secretary and comity notwithstanding. If the Commission intends to give controlling weight to the Secretary's views regarding service such as that proposed here, it is difficult to perceive the point of the instant litigation. If, on the other hand, the Commission intends to regulate government concessionaires like petitioner Universal in a fashion substantially similar to its regulation of other licensees, then the potential for dispute and disagreement between that body and the Secretary is both considerable and pervasive. At the very least, the Transit Commission and the Secretary would significantly duplicate each other's regulatory activities. The likely result would be that that body would exercise control over matters entirely outside the scope of its legitimate area of concern, and thus not only duplicate but frustrate the Secretary's aims.

It should be noted, moreover, that the contract between the Secretary and Universal contemplates

continuous, day-to-day supervision of the concessionaire's performance by the National Park Service. Universal's personnel will wear uniforms approved by the Park Service and the minibuses will bear a Park Service emblem. Universal's situation is thus not analogous to an independent contractor selling a service to the government, and it is in this context that respondents' suggested distinction between transportation provided directly by a governmental agency and transportation provided on behalf of the government through a private company should be evaluated.

Respondents say that the compact's exception for transportation by the federal government applies only where the governmental agency itself is rendering the service, and not where it is provided for the government pursuant to contract. Moreover, they add, the contemplated service will actually be provided for the public in any event, and not the government. But the very point is that the service is one to be provided by the government, albeit through a private instrumentality, in order to serve a public need. It seems quite anomalous to read the compact as exempting a service in national park areas if performed solely by government employees, but not the same service if the government determines to provide it through a private instrumentality, subject to its comprehensive supervision. The same functions will be performed, the same routes followed, the same District streets crossed—regardless of whether the Secretary or his agent in fact provides the service. In short, the impact on matters and areas properly within the Commission's jurisdiction will be the same whether one or

the other in fact performs the service. That Congress, in approving the compact, intended that a line such as respondents suggest be drawn seems doubtful. Rather, it appears, the congressional preference would be for substance over form in construing this exemption. Accordingly, the transportation service here involved, to the extent that it comes within the provisions of the compact at all, should be regarded as constituting "transportation by the Federal Government."

III. OTHER FACTORS CONFIRM THE EXCLUSION OF THE PROPOSED SERVICE FROM THE TRANSIT COMMISSION'S JURISDICTION

1. One consideration that should not be lost sight of here is that the contemplated service will be offered entirely within the limits of a federal enclave. There will be no use of District of Columbia streets, no substantial involvement with commuter traffic, and no significant conflict with any areas of Transit Commission control. The fact that crossings of District streets will be made at Third, Fourth, Seventh, Ninth and Fourteenth Streets is only incidental. Furthermore, even these streets are subject to application of the Secretary's regulations pursuant to the provisions of the Act of March 4, 1909 (35 Stat. 994 (D.C. Code, Sec. 8-144)).¹¹ Moreover, one of the Secretary's pur-

¹¹ In the affected area, Twelfth Street has already been placed underground and construction has been initiated to do the same with Third and Ninth Streets. A long-range master plan has been approved in substance by the National Capital Planning Commission which contemplates the tunneling of all the present north-south crossings of the Mall and the conversion of the area into a large open space reserved for pedestrians. An integral part of that plan calls for the elimination of all

poses is to reduce traffic congestion in the Mall area—a development which would seem to be helpful to the Commission in its regulation of public mass transit in and around that national park area.¹²

2. Respondents place some reliance on certain provisions of the Interstate Commerce Act, 49 U.S.C. 303(b)(4) and 309(a)(1), which exclude from that Commission's jurisdiction "motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments," except in regard to matters "relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment * * *." They assert that this legislation shows that the Secretary lacked "exclusive charge and control" over all aspects of transportation in national park areas prior to the creation of the Transit Commission. And they seem to argue that the "police powers" exception in the legislation approving the compact is somehow rendered less significant in light of the ICC's limited control over certain aspects of transportation controlled by the Secretary in national park areas. It is not clear what such a narrow and appropriate exception from the Secretary's ex-

~~vehicular traffic in the area other than that of the type contemplated by the instant arrangement.~~

¹² In addition, although we do not attempt to develop the point at any length, it seems at least questionable whether what is essentially a round-trip, interpretive shuttle service in one limited and defined national park area constitutes "transportation * * * between any points"—in the language of the compact—except in the most literal sense of that phrase.

clusive authority over such transportation has to do with the scope of the National Park Service's police power, as referred to in subsequent legislation on a distinct subject. Moreover, it could hardly have been the intent of Congress to grant a more general jurisdiction over transportation in national park areas in the District of Columbia to the Transit Commission—which is effectively controlled by representatives of Maryland and Virginia. Such authority was specifically withheld from the federally created Interstate Commerce Commission, even though that body was otherwise given jurisdiction over transportation in "any reservation under the exclusive jurisdiction of the United States" (49 U.S.C. 309(a)(1)).

Finally, a point raised by respondent D.C. Transit System, Inc., should be mentioned. That respondent, at various stages of this litigation, referred to the provisions of Section 3 of its franchise as an alternative ground for its contention that the government's concessionaire must obtain a certificate of public convenience and necessity from the Transit Commission. This contention was rejected by the district court (see App. 110-112), but was not reached by the court of appeals, in light of its reversal on other grounds. In any event, reliance on Section 3 of the D.C. Transit franchise is misplaced, and it adds nothing to respondent's position.

In pertinent part, that franchise clause (Act of July 24, 1956, 70 Stat. 598) provides that "[n]o competitive * * * bus line, that is, bus * * * line for the transportation of passengers of the character which runs over a given route on a fixed schedule,

shall be established to operate in the District of Columbia without prior issuance of a certificate by the Public Utilities Commission * * *." Thus, that section applies only to the transportation of "over a given route on a fixed schedule," i.e., to the regular schedules and routes that constitute the essence of normal bus service in a metropolitan area. D.C. Transit does not contend that this provision gives it an exclusive right to engage in sightseeing activities in the District of Columbia. Indeed, it is clear that the section does not apply to competitive sightseeing activities such as those carried on by other respondents (Tr. 55-57). Accordingly, it cannot be properly construed as including a reference to services such as those contemplated under the government's contract with petitioner Universal (Tr. 81-82).

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the cause remanded for reinstatement of the district court's judgment dismissing the action.

Respectfully submitted.

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MAY 1968.

